

Define Use of Force: Determining When Robbery Can be Charged as First Degree

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Robbery is a simple crime, but it has become a hot topic in Kentucky courts of late. The core conduct in robbery occurs when a theft occurs (or is attempted), accompanied by a use of force. First degree robbery occurs when the defendant causes physical injury to anyone not a participant in the crime, is armed with a deadly weapon or uses or threatens to use a dangerous instrument. An issue that commonly arises in case law, however, is whether a particular item is, in fact, a deadly weapon, so that the case becomes a robbery in the first degree.

In the recent case of Wilburn v. Com., 312 S.W.3d 321 (Ky. 2010), the defendant (and his two accomplices) entered a Louisville liquor store at closing time. Wilburn pointed his firearm at one of the clerks and pulled the trigger, but nothing happened. The clerk grabbed a gun and fired at the robbers, who took flight and ran in different directions. Responding officers quickly apprehended one of the robbers, who identified Wilburn as the gunman. The morning after the robbery, an unloaded revolver was found near the store. The Court noted this perhaps explained why the gun did not fire during the robbery. Ultimately, ammunition was found in the getaway vehicle which suggested “that the Wilburn brothers may have simply forgotten to load the gun before the robbery attempt.”

Wilburn was convicted of robbery in the first degree and appealed.

Wilburn argued that first-degree robbery wasn’t an appropriate charge because the prosecution failed to prove the revolver he carried was operable and as such, failed to prove he was armed with a deadly weapon. The Court noted that it was unclear from the court record why the gun was unloaded, “whether it was forgetfulness or a deliberate decision.” No tests were done to show if the weapon was operable if properly loaded. Under the state of the law at the time of the offense, pursuant to Merritt v. Com., 386 S.W.2d 727 (Ky. 1965) and Kennedy v. Com., 544 S.W.2d 219 (Ky. 1977) so long as an object is held in such a way that the victim would believe it was a deadly weapon, it would be considered



so for charging purposes. The Court used Wilburn for the opportunity to re-assess the holdings in those cases, noting that the Merritt decision “failed to comport with the plain language” of KRS 515.

In its criticism, the Court noted that Kentucky’s definition of deadly weapon, in KRS 500.080(4)(b) requires that such weapons must be able to discharge a shot, and that an unloaded firearm is unable to do so. Merritt was decided prior to the revision of the penal code and terms >>